Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

No. 05-60

In The

Supreme Court of the United States

JOHN A. HICKEY,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID J. COHEN
Bar No. 145748
COHEN & PAIK LLP
177 Post Street
Suite 600
San Francisco, CA 94108
Telephone: 415-398-3900
Facsimile: 415-398-7500

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I.

Whether the failure of the government to present to the grand jury any evidence of one of the elements of a federal criminal offense creates a defect in the indictment giving rise to the right of a criminal defendant not to be tried, and, consequently, the right to an interlocutory appeal under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989)?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff, United States of America and the Defendant-Petitioner, John A. Hickey. Plaintiff is represented by Tim Crudo and Christopher Steskal, Assistants United States Attorney for the Northern District of California (San Francisco).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. INTRODUCTION	2
B. PROCEDURAL BACKGROUND	2
REASONS FOR GRANTING THE WRIT	7
ARGUMENT	7
A. INTRODUCTION	7
B. THE SECOND PRONG OF *COHEN* IS MET IN THIS CASE	8
C. *MIDLAND ASPHALT CORP. V. UNITED STATES* REQUIRES THE CONCLUSION THAT THE FAILURE OF THE GOVERNMENT TO PRESENT ANY EVIDENCE TO THE GRAND JURY CONCERNING ONE OF THE ELEMENTS OF A CRIMINAL OFFENSE MEETS THE SECOND AND THIRD PRONGS OF THE *COHEN V. BENEFICIAL LOAN CORP.* TEST FOR INTERLOCUTORY JURISDICTION	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Abney v. United States, 431 U.S. 651 (1977).....5, 8, 9, 11

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).....8

Bins v. United States, 331 F.2d 390 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964).....8

Cohen v. Benefical Indus. Loan Corp., 337 U.S. 541 (1949).....7, 8

Costello v. United States, 350 U.S. 359 (1956)..... 3, 4, 6, 8

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989).....8, 10, 11, 12, 13

Reno v. United States, 317 F.2d 499 (5th Cir.), *cert. denied*, 375 U.S. 828 (1963).....8

Thomas v. United States, 418 F.2d 567 (5th Cir. 1969).....8

United States v. Aguilar, 756 F.2d 1418 (9th Cir. 1985).....8

United States v. Aracri, 968 F.2d 1512 (2d Cir. 1992).....8

United States v. Bird, 342 F.3d 1045 (9th Cir. 2003).....4, 5, 6, 11

United States v. Bird, 359 F.3d 1185 (9th Cir. 2004)..... 5, 6

United States v. Crysopt Corp., 781 F. Supp. 375 (D. Md. 1991).....3

United States v. Deluca, 692 F.2d 1277 (9th Cir. 1982).....3

TABLE OF AUTHORITIES – Continued

Page

United States v. Greer, 956 F. Supp. 520 (D. Vt. 1997) 9

United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988) 3

United States v. Mechanik, 475 U.S. 66 (1986).....6, 8, 10, 11

United States v. Pupo, 841 F.2d 1235 (4th Cir. 1988)..... 3

United States v. Warner, 428 F.2d 730 (9th Cir.), *cert. denied*, 400 U.S. 930 (1970)..... 8

Vazquez v. Hillery, 474 U.S. 254 (1986)..... 10

CONSTITUTION

U.S. Const. amend V 2, 12

STATUTES:

18 U.S.C. § 3141 10

28 U.S.C. § 1254(a)(1) 1

RULES AND REGULATIONS:

Fed. R. Crim. P. 6 ..... 10, 12

OTHER AUTHORITIES:

Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 Am. Crim. L. Rev. 1443, 1456 (2001) 12

PRAYER

The Petitioner, John Hickey, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit decided April 30, 2004.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dismissing Mr. Hickey's interlocutory appeal for lack of jurisdiction is reported at 367 F.3d 888 (9th Cir. 2004), amended, ___ F.3d ___ (March 8, 2005).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a)(1). This petition is filed within the extension of time granted by Justice O'Connor, who, on June 2, 2005, extended the time for the filing to and including July 6, 2005. It is timely filed under the Rules of the Supreme Court of the United States.

[1] On April 30, 2004, the Ninth Circuit denied Petitioner's request for rehearing. (App. 1). Citations to "RT" refer to the Reporter's Transcript of the proceedings below. Citations to "ER" refer to the Excerpt of Record filed in the Ninth Circuit. Citations to "App." refer to the appendix tc this Petition for a Writ of Certiorari. Citations to Petition for Rehearing refer to the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed before the Ninth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "

STATEMENT OF THE CASE

A. INTRODUCTION

On April 30, 2004, the Ninth Circuit Court filed its opinion in this case, which was amended on March 8, 2005 upon denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc*. (App. 1-17).

B. PROCEDURAL BACKGROUND

During a pretrial hearing, the district court ordered the government to provide to the defense a redacted copy of the grand jury testimony. Upon review of this testimony, it became clear that, apparently, no evidence of the element of mail fraud – that the documents facilitating the fraud alleged in the indictment were actually placed in the United States mails – was adduced before the grand jury. The superseding indictment, which was returned in January 2002, and well outside the statute of limitations, alleged only mail fraud counts. These counts could only be

legally alleged if the original indictment was valid and tolled the applicable statute of limitations.[2]

Mr. Hickey moved to dismiss the superseding indictment because its mail fraud counts were based on an improper foundation of mail fraud counts in the initial indictment for which no evidence of mailing was presented to the grand jury. The district court reviewed the entire grand jury transcript, but refused to provide it to defense counsel. The district court denied the motion, and stated that, "Now, it's true you [Hickey's counsel] don't have an opportunity to see it yourself and argue to the contrary, and you might well want to argue to the contrary." ER 192.

The government, before the Ninth Circuit, properly argued that the sufficiency of the evidence before the grand jury is not an issue which can be reviewed by the courts. *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Deluca*, 692 F.2d 1277 (9th Cir. 1982). It cannot be reviewed on an interlocutory basis or on appeal after judgment. *Id.* The government did not argue, and has never argued, that *any* evidence of mailings was ever presented to the first grand jury, and has refused, both at the district court and appellate levels, absent court order,

---

[2] A defective original indictment is a "nullity" and therefore cannot toll the statue of limitations. *United States v. Crysopt Corp.*, 781 F. Supp. 375 (D. Md. 1991).

The Fourth Circuit has expressly held that a defective indictment confers no jurisdiction whatsoever upon the trial court. *United States v. Hooker*, 841 F.2d 1225, 1231-32 (4th Cir. 1988) (en banc); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988) (en banc). Accordingly, "a defective original indictment is simply a nullity. An invalid indictment which fails even to invoke the Court's jurisdiction clearly cannot serve to block the door of limitations as it swings closed." *Crysopt*, 781 F. Supp. at 378.

to provide the entire and unredacted grand jury transcript to the defense.[3]

The issue before the Court, however, and the subject of the interlocutory appeal is not whether there was sufficient or missing evidence before the grand jury. Rather, the question as framed by the defense, and addressed by the Ninth Circuit, was whether interlocutory jurisdiction lies if *no* evidence whatsoever is presented to the grand jury on the question of mailings.

The defense argued to the Ninth Circuit that the question of *no* evidence before the grand jury is different from the question of sufficiency, as articulated in *Costello*, because the government, otherwise, could present *no* evidence to the grand jury, print an indictment on the word processor, instruct the foreperson to sign it, and obtain a conviction.

At oral argument, the Ninth Circuit panel engaged in a colloquy with defense counsel about the case of *United States v. Bird*, 342 F.3d 1045 (9th Cir. 2003), which was later withdrawn. The original *Bird* opinion came down after Mr. Hickey filed his opening brief, but before the government filed its answering brief. The original *Bird* case held that the question of whether an indictment, on its face, alleges every element of an offense required by law is subject to interlocutory review. In the colloquy at oral argument, defense counsel pointed out that the issue of whether *no* evidence on an element of an offense is

---

[3] In our opening brief before the Ninth Circuit, we argued that the court, if it found it had interlocutory jurisdiction, should then review the entire grand jury transcript to determine if *any* evidence of mailings was adduced.

introduced before the grand jury should be analyzed in the same way as whether the indictment fails to state a required element of an offense. This is because in both cases the grand jury returns an indictment without ever passing on a required element of a criminal charge. *A fortiori*, if there is interlocutory jurisdiction in the first instance, there should be interlocutory jurisdiction in the latter instance. The Ninth Circuit acknowledged, at oral argument that,

> JUDGE: And so that was of course – so that's actually the premise that we start with. In other words, there's predisposition against the interlocutory appeal. But I, grant you. I think that it is appropriate to have an interlocutory appeal and our challenge is to figure out on which side of the line do you fall within *Bird* and the other cases.

Petition for Rehearing, Transcript of Oral Argument, Appendix B at 7.

When oral argument before the Ninth Circuit took place in this case on January 13, 2004, the *Bird* court was considering a Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*. Petition for Rehearing, Appendix C. The *Bird* panel withdrew its opinion on February 10, 2004. *Id.* It then issued an amended opinion on March 3, 2004, *United States v. Bird*, 359 F.3d 1185 (9th Cir. 2004). In the amended opinion, citing to *Abney v. United States*, 431 U.S. 651 (1977), the *Bird* panel reversed itself and found it had no interlocutory jurisdiction over an appeal of an indictment's insufficiency where the question was whether the indictment, on its face, failed to allege a required element of a criminal offense.

The *Bird* issue was never heard by the Ninth Circuit *en banc*, and was never the subject of a Petition for Writ of Certiorari before this Court. The Ninth Circuit panel in this case did not render its decision until April 30, 2004, or until after the amended *Bird* decision came down and the time for the *Bird* appellants to file a suggestion for rehearing *en banc* had expired. In the opinion in this case, the Ninth Circuit panel relied on *Bird* (as amended) in holding that a court may not inquire, on interlocutory appeal, into whether a grand jury has passed upon every element of an offense. In so holding, the panel also found that *Bird* (as amended) had implicitly extended *Costello* to mean that the courts may not inquire into the issue of whether a grand jury has been presented with *any* evidence of a required element of a criminal offense.[4]

Upon denial of rehearing, the Ninth Circuit amended its opinion. The amended opinion held that the question of whether a grand jury has been presented with no evidence concerning one of the elements of a criminal offense does not meet either the second or third prong of Cohen's three part test for interlocutory jurisdiction, that is, that it is not an "important issue" completely separate from the merits of the action, and it is not an issue which involved an

---

[4] This case presents an even more powerful argument for interlocutory jurisdiction than the *Bird* situation – the failure of an indictment to state an element of the offense. While the question of the insufficiency of an indictment on its face may be heard and result in reversal on appeal after final judgment, the issue of whether an indictment which is sufficient on its face resulted from the presentation of *no* evidence on one or more elements of a criminal offense might never be heard on direct appeal because the judgment of conviction by the petit jury could be held to render the error harmless. *United States v. Mechanik*, 475 U.S. 66 (1986).